Supreme Court, U. S.
FILED
MAR 26 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1217

ALBERT E. ANDREWS, III,

Petitioner,

vs.

LIEUTENANT GENERAL WILLIAM KNOWLTON, Superintendent, United States Military Academy, BRIGADIER GENERAL PHILIP R. FEIR, Commandant, United States Military Academy, and HOWARD H. CALLAWAY, Secretary of the Army,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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LUTZ APPELLATE PRINTERS, INC.
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South River, N.J. (201) 257-6850 | New York, N.Y. (212) 565-6377 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Second Circuit entered in the above entitled case on January 16, 1975.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit (1a, *infra)* is not yet reported.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on January 16, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a United States Military Academy cadet, was denied his Fifth Amendment constitutional right to due process of law when he was found to have violated the Cadet Honor Code in proceedings before a Cadet Committee which were ". . . wholly lacking in procedural safeguards. . ." .

2. Whether petitioner was erroneously foreclosed by the dismissal of the complaint before discovery, from factually establishing the impact of the finding of guilt by the Cadet Honor Committee upon the members of the later Officer Board, as an incident to proving his claim that the absence of procedural due process guarantees before the Cadet Honor Committee was prejudicial to him.

3. Whether the use of an allegedly false written report against petitioner, a Military Academy cadet, in administrative Honor Code violation adjudications against him, which report was obtained from the cadet under compulsion of military orders and without advice of rights at a time when the cadet was under investigation for disciplinary offenses which could have resulted in criminal charges under the Uniform Code of Military Justice, amounted to a denial of his Fifth Amendment privilege against compelled self-incrimination.

CONSTITUTIONAL PROVISIONS INVOLVED

The portions of the Fifth Amendment of the Constitution relevant to this petition declare:

> "No person shall be . . . compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law. . . ."

STATEMENT OF FACTS

This is a petition for writ of certiorari to review the dismissal of a complaint for declaratory and injunctive relief which challenged the administrative procedures by which petitioner, a cadet at the United States Military Academy, was separated and dismissed from the Academy for violation of the Cadet Honor Code. On the virtual eve of his scheduled graduation from the Academy at West Point, petitioner was informed that he was being denied both the degree of Bachelor of Science in Engineering and the commission as a Lieutenant in the United States Army which are bestowed upon graduating cadets. Also by the terms of his separation order, petitioner was ordered to serve two years of active duty in the enlisted ranks of the Army (Andrews Appendix, pp. 27a-28a).[1]

The purported basis of petitioner's separation from the Academy was his violation of the Academy's "Honor Code," which declares that no cadet shall

1. References preceded by "Andrews Appendix, p —a" refer to Appendix of Albert E. Andrews in the appeal below.

> ". . . lie, cheat or steal or tolerate those who do."

and which sets forth the single penalty of separation from the Academy for its violation (6a).[2] In petitioner's case, the violation did not involve academic cheating, which has been the subject of recent widespread publicity. Instead, it arose out of a disciplinary investigation into the presence of an unauthorized vehicle at the Academy in the early morning of February 4, 1973. Cadet Andrews' written report that he had been present on the Academy grounds with the vehicle for a period of fifteen to twenty minutes differed from a Military Police report that the vehicle was observed on the grounds for a period in excess of two hours. The discrepancy was labelled a lie for Honor Code purposes, and, accordingly, proceedings were commenced to adjudicate Cadet Andrews an Honor Code violator.

In accordance with Academy procedure, the factual adjudication of the Honor Code charges against Cadet Andrews took place in two stages: a cadet-operated Honor Committee, followed by an Officer Board appointed by the Academy's Superintendent.

1. *The Cadet Honor Committee Adjudication.*

The Cadet Honor Committee is made up of forty-four elected cadets, of whom twelve are chosen by the Cadet chairman for purposes of hearing a given case (6a). The applicable standard of proof is "beyond a reasonable doubt," and a unanimous vote is required to convict (6a, 13a).

The Honor Committee hearing in Cadet Andrews' case took place in early March, 1973. Throughout the proceedings, Cadet

2. Reference numbers suffixed by the letter "a" refer to Appendix hereto.

Andrews continued to maintain that he had returned to the post to drop off a fellow cadet and that he had gone into the barracks for, as he remembered it, a brief fifteen or twenty minute period (Andrews Appendix, p. 59a). Prior to the hearing, Cadet Andrews was denied the right to consult with military counsel. He was also denied the right to be represented by an attorney at the hearing. Although he was permitted to (and did) testify and summon witnesses in his own behalf, he was denied the opportunity to confront or cross-examine the witnesses against him, including Military Police Officers, who testified (Andrews Appendix, pp. 18a-19a). In fact, the Court below found it to be ". . . clear that the proceedings before the Cadet Honor Committee were wholly lacking in procedural safeguards. . ." (16a).

The Cadet Honor Committee determined that the Honor Code had been violated. The immediate consequence of the Cadet Committee adjudication was that Cadet Andrews was:

> ". . . administratively segregated from the Corps and placed in 'Boarders Ward.' The purpose of Boarders Ward is to quarter those cadets who are undergoing separation actions. Permitted to attend classes, the cadet is sequestered in Boarders Ward until final disposition of his case" (7a).

As detailed by the record below, administrative segregation included isolation from fellow cadets, prohibition against participation in extracurricular activities and inter-collegiate athletics (White Appendix, pp. 83a, 94a).[3]

3. References preceded by "White Appendix, p._a" refer to the Appendix of William White, et al. in the consolidated appeal below.

Also as detailed in the opinion below, the Honor Committee's adjudication of guilt results in a cadet being confronted ". . . with the hard choice of either resigning or electing to go before a Board of Officers" (15a). Further as a result of the Honor Committee's adjudication, a cadet suffers character taint and permanent damage to his military career (18a). That taint immediately attaches to a cadet in the eyes of his peers, and, at the time of petitioner's conviction, it could have resulted in the imposition of a permanent form of social ostracism known as the "silence." By unofficial tradition, the silence, in effect a vote by fellow cadets never to speak to a cadet again except officially, would remain with a cadet for the rest of his military career, even if he were later exonerated by subsequent review procedures. (White Appendix, p. 76a. See also Opinion of District Court in *White v. Knowlton*, consolidated with that of Petitioner Andrews on Appeal, White Appendix, p. 18a). Indeed, the Court below observed that such:

> ". . . ignominy suffered [by later exonerated cadets] while at the Academy and injury to future officer careers . . . clearly raise important questions concerning the need for procedural safeguards at an initial hearing before the Cadet Honor Committee" (18a).

2. *The Officer Board Adjudication.*

In accordance with Academy procedures, the Superintendent of the Academy (Respondent Knowlton) after receiving the report of the Honor Committee's adjudication, offered Cadet Andrews an opportunity to resign from the

Academy (7a). When Cadet Andrews did not resign, the Superintendent, pursuant to Regulation 16.04 of the Regulations of the United States Military Academy, ordered an Officer Board convened to investigate and make findings as to whether an Honor Code violation had occurred (5a).

The Officer Board met on April 5, 1973. It consisted of five officers, all members of the faculty and staff at the Academy, three of whom were themselves graduates of the Academy (Andrews' Appendix, p. 20a). Procedures before the Officer Board are governed by Army Regulation 15-6 , which sets the standard of proof at "substantial evidence" and which permits findings to be based upon a majority vote (8a). At that hearing, Cadet Andrews was represented by military counsel. A "Recorder" (Prosecuting Attorney) presented the case against him. It was at that point that Cadet Andrews was first given the opportunity to confront and cross-examine the witnesses against him (Andrews Appendix, p. 20a). In that hearing, the motion was made to exclude the written statement which formed the basis of the charge, which motion was denied (26a-27a). The Officer Board, by a four-to-one decision, also found that the Honor Code had been violated (Andrews Appendix, p. 20a). Testimony at that hearing was recorded, and a transcript was made, a copy of which was presented as a defense motion exhibit and which was a part of the record before the Court below.

On the basis of the Officer Board's findings, the Superintendent recommended that Cadet Andrews be separated from the Academy, and that recommendation was administratively approved (8a).

3. *The Holding of the Court Below on Due Process Issues.*

The Court below held that the activities of the Cadet Honor Committee must be considered government activity for purposes of due process analysis (14a-15a). It also found that the type of ignominy and injury to careers which resulted from Cadet Honor Committee guilty adjudications ". . . raise important questions concerning the need for procedural safeguards" at that level with respect to later exonerated cadets. However, the Court denied relief to petitioner by holding that the Honor Committee hearing was not a "critical stage" entitling petitioner to procedural due process guarantees since the later proceedings before the Officer Board were *de novo* and were free from the possibility of infection and taint from the Honor Committee proceedings (16a-17a). Since petitioner was *not* exonerated by the Officer Board, the Court below ruled that he, along with the other appellants in the consolidated appeal, lacked standing to complain of the recognized injuries to character resulting from the initial Honor Committee Adjudication (18a).

4. *Petitioner's Efforts to Obtain Discovery.*

Bearing upon the issue of what effect the earlier Honor Committee adjudication of guilt had upon the members of the Officer Board, three of whom were Academy graduates, petitioner sought and was denied at the District Court level the opportunity to conduct depositions of the members of the Board. In affirming the District Court, the Court below held that:

> ". . . on the basis of mere assertion that a West Point officer, sitting as a member of the Board of Officers, cannot fairly consider that evidence

> against a West Point cadet, the Court below properly rejected the request to take deposition testimony of the officers" (16a).

It also found that the Officer Board proceedings

> ". . . were as free from infection and taint as is a trial in which jurors are aware that the defendant before them has been indicted by a grand jury" (17a).

The Court therefore held that there were ". . . no genuine issues as to any material fact," and affirmed the award of summary judgment to respondents.

5. *Use of Compelled Statements Against Petitioner.*

As part of the investigation of disciplinary infractions against Cadet Andrews, he was required to make two written statements giving his version of the underlying circumstances. The second of these statements formed the basis of the Honor Code charges against him since it set forth the alleged "lie" that the automobile was only present on the post for a period of fifteen to twenty minutes (19a). In his complaint, petitioner alleged that use of the second compelled statement in the proceedings against him, over his objection, violated his Fifth Amendment privilege against compulsory self-incrimination and his right to due process of law. The Court below denied petitioner's motion for summary judgment on this claim and instead granted respondents' motion to dismiss this part of the complaint.

The Court below affirmed the dismissal of this portion of petitioner's complaint, holding that while the compelled statement could not be used as a basis for prosecuting petitioner for the underlying disciplinary offenses of which he was suspected at the time he made the statement, by analogy to cases involving perjury before grand juries:

> ". . . his false statement is still subject to 'prosecution' as a breach of the Honor Code" (19a-20a).

REASONS FOR GRANTING THE WRIT

This Court has very recently observed that concern for due process of law in situations of academic discipline:

> ". . . would be most academic if the disciplinary process were a totally accurate unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Goss v. Lopez*, 95 S. Ct. 729 (1975).

In this petition, petitioner asks this Court to review the proceedings which resulted in his expulsion from the United States Military Academy to evaluate whether and to what extent in that process he has been deprived of important procedural safeguards.

1. The ruling below effectively denies to petitioner, a Military Academy cadet seeking to preserve his qualification to become a commissioned military officer, any fundamental rights to procedural due process of law in an adjudication before a Cadet Honor Code Committee. Thus, petitioner has found himself with far fewer rights at that critical level than were available to a welfare recipient seeking to prevent a termination of benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); to a college professor protesting the loss of his job, *Perry v. Sindermann*, 408 U.S. 593 (1972); to a convict protesting parole or probation revocation, *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); to the employee of a government contractor protesting revocation of his security clearance, *Greene v. McElroy*, 360 U.S. 474 (1959); to a citizen protesting the placing of her name upon a public list of undesirables to whom the sale of liquor is to be denied, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); to a citizen contesting the temporary pre-judgment replevin of her gas stove, *Fuentes v. Shevin*, 407 U.S. 67 (1972); and to a garnishee protesting the garnishment of his wages, *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Petitioner urges this Court to grant a writ of certiorari in order to determine whether this apparent imbalance in due process protection should be judicially corrected.

Petitioner contends that for the following reasons, the Cadet Honor Committee hearing, which the Court below has held to be a governmental function for due process purposes (14a-15a) and which the Court below conceded to be ". . . wholly lacking in procedural safeguards," (16a), was in fact a "critical stage" in the process of his separation from the United States Military Academy:

a. As the Court below expressly found, all cadets found guilty by a Cadet Honor Committee suffer immediate and substantial limitations of freedom, permanent damage to character, and irremediable impairment of future career potential. The immediate option extended to petitioner as a result of the finding by the Cadet Honor Committee was the opportunity to resign from the Academy (7a). Even if later exonerated, a convicted cadet at the time of petitioner's conviction stood the risk of being forever "silenced" by his fellow cadets, based upon the verdict of the Cadet Committee. Clearly, therefore, a cadet's "good name, reputation, honor or integrity is at stake" at the cadet level, and he should at that stage be entitled to due process protection. *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

b. Valuable procedural rights available to petitioner at the Cadet Honor Committee level were forever lost once he reached the Officer Board stage. The standard of proof applicable to the Cadet Honor Committee hearing (beyond a reasonable doubt (13a)) and the requirement of unanimous consent in the verdict (6a) were higher than the corresponding standards at the later Officer Board hearing ("substantial evidence" and a majority vote (8a)). Denial to petitioner of the availability

of his due process rights at a time when these higher standards were applicable prevented him from presenting his case in the most effective manner at a time when maximum effectiveness would have been most meaningful in his favor.

As a matter of fact, the impact of due process rights is graphically illustrated in this case by the fact that, in spite of the lesser standard of proof before the Officer Board, the verdict was not unanimous. One officer dissented (Andrews Appendix, p. 20a). From this, it is not unrealistic to infer that the availability of rights to counsel and confrontation before the Cadet Honor Committee could well have resulted in at least one dissenting vote at that level. In such event, petitioner would not have been convicted of an Honor Code violation, since: "if there is one 'not guilty' vote, the proceedings end and the case is closed" (6a). Petitioner would have graduated, and he would now be an Army officer. Certainly loss of these procedural advantages above should be sufficient to establish that the Cadet Honor Committee hearing was a "critical stage" for purposes of establishing entitlement to essential due process rights. *Armstrong v. Manzo*, 380 U.S. 545 (1965).

c. Petitioner was obligated to testify and commit himself to a strategy of defense at the Cadet Honor Committee hearing, thus drawing the legal battle lines for the controversy, before even being given an opportunity to consult counsel. Moreover, at the time when counsel did become available, due to the passage of time, evidence had become stale and witnesses harder to find. Petitioner was thus deprived of the opportunity to effectively prepare a case with the unfettered assistance of counsel who could

> ". . . help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the [client]." *Goldberg v. Kelly*, 397 U.S. at 270. See also *Coleman v. Alabama*, 399 U.S. 1 (1970).

d. Finally, petitioner has alleged that his conviction by the Cadet Honor Committee had a possible effect upon the later Officer Board. This allegation is based upon the fact that it was common knowledge among the officers that a guilty verdict by the Cadet Committee would have permanent impact upon petitioner's status, regardless of the outcome of the Officer Board hearing. Honor is a vital commodity to a cadet. For all practical purposes, petitioner had lost his honor as a result of the Cadet Committee's adjudication. If the tendency of the members of the Officer Board was to conclude from these facts that a "not guilty" adjudication by them would be of little significance since much of the damage to petitioner was already done, then petitioner was placed at an undue disadvantage by the Cadet Honor Committee hearing which took place without due process procedural safeguards. The deprivation by the Court below of petitioner's efforts to establish the effect of his earlier conviction upon the later hearing is the subject of a separate reason for granting the writ. See *infra* at Part 5. However, at least for purposes of finding that the Honor Committee constituted a "critical stage" this Court should apply the proposition set forth in *Peters v. Kiff*, 407 U.S. 493 (1972), a case challenging the racial makeup of grand juries:

> "It is in the nature of the practices here challenged that proof of actual harm, or lack of

> harm, is virtually impossible to adduce. . . . Consequently, it is necessary to decide on principle which side shall suffer the consequences of unavoidable uncertainty." 407 U.S. at 504.

Under the circumstances set forth here, petitioner urges that this "unavoidable uncertainty" be resolved in his favor by extending to him procedural protection at the earliest hearing stage.

In light of all of the above, to hold that petitioner's rights to procedural due process did not attach at the Cadet Honor Committee level marks a substantial departure from the holdings of this Court that minimum due process requirements must be satisfied whenever

> ". . . a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him. . . ." *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Goss v. Lopez*, 95 S. Ct. 729 (1975).

and indeed,

> ". . . in almost every setting where important decisions turn on questions of fact. . . ." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

2. The Court below has erroneously concluded that the later Officer Board hearing constituted a *de novo* stage of the proceedings which cured the wholesale denial of basic due

process rights at the Cadet Honor Committee level. In so doing, it has far expanded the dimensions of the concept of *de novo* cure heretofore recognized by this Court. If uncorrected, such an expansion will result in the erosion of meaningful due process rights painstakingly elucidated by this Court in previous decisions.

The ruling of the Court below disregards the fact that due process hearings occurring only after protected interests are adversely affected are disfavored by the Court and are only condoned upon the demonstration of an important government need to proceed in the first instance without a due process hearing. See *Goldberg v. Kelly*, *supra*, at 261:

> ". . . the fact that there is a later constitutionally fair proceeding does not alter . . ." (the requirement of a pre-termination due process hearing).

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), even though a person's replevied property could be returned after a proper hearing and even though damages for loss would be available:

> ". . . no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." 407 U.S. at 82.

* * *

> ". . . the Court has traditionally insisted that, whatever its form, opportunity for that hearing

must be provided before the deprivation at issue takes effect." *Ibid.*

* * *

"The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property." *Id.* at 86.

Similarly, see *Boddie v. Connecticut*, 401 U.S. 371 (1971):

"That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." 401 U.S. at 378-379.

And in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court expressly held that the availability of a later trial *de novo* before a state trial court could not cure the due process defects which existed at the initial mayor's traffic court level, declaring:

"Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication." 409 U.S. at 61.

Further, it can hardly be said that the later hearing was in fact *de novo* for purposes of curing due process deficiencies, in view of the fact that the applicable standard of proof at the Officer Board stage was substantially lower than that applicable to the Cadet Honor Committee (substantial evidence *versus* proof beyond a reasonable doubt) as was the requirement of majority vote *versus* unanimity. Consequently, although the later hearing may have been new, it was not *de novo*, since, in the interim between hearings, petitioner had irretrievably lost his rights to be judged by the higher standard of proof and the higher vote requirement. Once such rights had been extended as they were at the Cadet Honor Committee level, they should not have been taken away as they were without due process.

As this Court held in *Armstrong v. Manzo*, 380 U.S. 545 (1965), fundamental due process rights:

". . . must be granted at a meaningful time and in a meaningful manner." *Id.* at 552.

There the Court held that the denial to a parent of due process rights to notice of an initial adoption proceeding was not cured by a later hearing because in the later hearing the burden upon the parent had significantly increased.

This Court should therefore grant the writ of certiorari to apply relevant constitutional principles to a determination whether the initial denial of due process was later cured at any stage.

3. The decision below threatens to substantially impair the right to procedural due process, as interpreted by this Court, in

that it purports to condition standing to assert procedural due process rights upon ultimate vindication of a party's claim on the merits. The Court below expressly acknowledged that permanent injuries to character and future careers are suffered by all who are convicted by Cadet Honor Committees, even those who are later exonerated by Officer Boards (18a). Accordingly, it expressed a ". . . need for procedural safeguards" at that level *(Ibid.)*. Nevertheless, it denied "standing" to petitioner to assert rights to such safeguards because he was later convicted by an Officer Board *(Ibid.)*.

To so hold is to condition one's entitlement to due process protection upon his ultimate proof that the adjudication in which he was denied his procedural rights reached factually incorrect results. Such a holding would be similar to requiring that a criminal accused establish his innocence before gaining standing to challenge procedural irregularities of constitutional dimensions at his trial. This proposition has long been rebuked by this Court. In *Fuentes v. Shevin*, 407 U.S. 67 (1972), where due process rights were extended to hearing on pre-judgment replevin of personal property, this Court held that due process procedural safeguards must be invoked if a significant protectible interest is at stake, ". . . whatever the ultimate outcome of a hearing" on the validity of the right asserted:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." *Fuentes v. Shevin*, 407 U.S. at 87.

Similarly, it has long been established that:

> "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915).

See also *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

In order to reaffirm and apply the correct principles of standing to this case, this Court should grant the writ of certiorari applied for herein.

4. Taking into consideration all of the circumstances of this case, including especially the significant losses which result immediately from an adjudication of guilt by the Cadet Honor Committee, petitioner should have, at the very least, been guaranteed rights to counsel, confrontation and cross-examination at the Cadet Honor Committee hearing. As this Court has repeatedly held:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg v. Kelly, supra*, at 262-63, quoting concurrence of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

The Second Circuit has further elaborated on this concept in applying the due process principle to the United States Military Academy, setting forth that due process is a

> ". . . flexible concept which depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is adversarial in nature, the severity and consequences of any action that might be taken, the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures, and the existence of other overriding interests, such as the necessity for prompt action in the conduct of crucial military operations." *Hagopian v. Knowlton*, 470 F.2d 201, 207 (2d Cir. 1972).

Petitioner has ultimately been deprived of his degree from the Academy and commission as an Army officer. The first significant step toward that result occurred at the Honor Committee level. As a result of that hearing, he immediately suffered restriction of freedom; he was requested to resign from the Academy to avoid being ordered separated; and he suffered permanent injury to his character and future military career. The hearing at which this took place was adversarial or inquisitorial in nature, at which witnesses, including petitioner, testified, evidence was evaluated, and a guilty verdict was reached.

Certainly under these circumstances, petitioner should have been accorded at least the same rights to counsel and cross-examination as were guaranteed in *Goldberg v. Kelly, supra*, in

welfare termination of benefits proceedings, in *Morrissey v. Brewer, supra*, in parole revocation proceedings, and in *Gagnon v. Scarpelli, supra*, in probation revocation proceedings. Certainly none of the circumstances which prompted this Court to limit rights to cross-examination and counsel within prison disciplinary hearings exist here. See *Wolff v. McDonnell*, ____ U.S.____ (1974).

Without the guarantee of the rights to counsel, confrontation and cross-examination, petitioner was not protected by his constitutionally guaranteed rights to due process of law at the critical Cadet Honor Committee stage. Consequently, this Court should grant the writ of certiorari in order to evaluate and set forth the true dimensions of petitioner's rights to due process of law at this level.

5. The affirmance of summary judgment relief on respondents' motion to dismiss was made at a time when *bona fide* issues of fact existed as to whether the earlier adjudication of the Honor Committee had an effect upon the later Officer Board. It therefore constituted a serious misapplication of the principles of summary adjudication.

The reasoning of the Court below that petitioner's rights to procedural due process were not violated was based on the assumption that the later Officer Board hearing was in truth a *de novo* adjudication, unaffected by the earlier finding of guilt by the Cadet Honor Committee. If, on the other hand, it could be factually established that the earlier guilty finding affected the members of the Officer Board in reaching their decision, then the denial of due process at the cadet hearing level would have

been prejudicial, even assuming that no independent due process rights otherwise attached at the Cadet Committee level.

Petitioner sought to develop this factual issue by filing notices of deposition of the members of the Officer Board. Due to the dismissal, he never had an opportunity to conduct those depositions.

The facts which form a basis for the inference that the Cadet Committee adjudication may have affected the later Officer Board adjudication are the very facts recognized by the Court below that a guilty finding by the Honor Committee results in ". . . a damaging record that will follow the cadet through life." (15a), and that "ignominy" and "injury to future officer careers" inevitably result from Honor Committee adjudication, notwithstanding later Officer Board exoneration (18a).

Petitioner sought to develop this factual issue by deposing the members of the Officer Board. Had it been permitted, his inquiry would have gone into the area of whether the officers knew that the future career of a cadet who had been adjudicated guilty by a Cadet Committee would probably be seriously affected adversely even if he were exonerated by an Officer Board and whether they knew that the cadet would be subjected to the traditional "silencing" (see Opinion of District Court in the consolidated case, *White v. Knowlton*, consolidated with that of Petitioner Andrews on appeal, White Appendix, p. 10a), which would prevent him from ever having normal social and personal relations with Academy alumni. In the event members of the Officer Board possessed such knowledge at the

time they heard Cadet Andrews' case, the further deposition inquiry would have sought to discover whether such knowledge had an impact upon the officers' determination of the case — whether in effect, it suggested that petitioner's fate had already been sealed by the Cadet Committee, thus rendering a possible exoneration by the Officer Board an apparent exercise in futility.

In the face of this fact situation, it was error for the Court below to affirm the dismissal of the complaint, thus foreclosing any discovery whatsoever, by resolving inferences in favor of the *moving* party and thereby concluding that there were ". . . no genuine issues as to any material fact" (20a).

As this Court has frequently set forth, summary judgment relief should be denied so long as it appears that a genuine issue of fact appears unresolved. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). As the Court held in *United States v. Diebold, Inc.*, *supra*, inferences to be drawn from underlying facts ". . . must be viewed in the light most favorable to the party opposing the motion." 369 U.S. at 655.

Although, as the Court below pointed out, challenges to the mental processes of administrative hearing officers are not lightly accepted, *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974) (rejection of claim that housing hearing officer was biased due to the fact he was employed by the parent entity of one party); *National Nutritional Foods Association v. Food & Drug Administration*, 491 F.2d 1141 (2d Cir. 1974) (rejection of claim that the Food & Drug Commissioner could not have given "personal consideration" to orders before him

during short time available), in neither of those cases did factors exist similar to those in the case at bar which reveal the possibility that hearing officers could have been affected in their determinations by the knowledge that an earlier adjudication had already done irreparable harm, regardless of the outcome of the later hearing. It is submitted instead that, at least for purposes of withstanding a pre-discovery motion to dismiss, this Court should be governed by the standard set forth in *Peters v. Kiff*, 407 U.S. 493 (1972), discussed above. At least until he has had an opportunity to conduct discovery in this case, the "unavoidable uncertainty" as to what effect, if any, the earlier adjudication had upon the Officer Board, should be resolved in favor of petitioner, as it was resolved in favor of those challenging the grand jury make-up in *Peters*, since he stands to lose so much by ultimate defeat in this action. Failure to review this matter and so hold will result in an undue expansion of the summary judgment remedy, in effect denying the party opposing the motion the benefit of favorable factual inferences.

6. The ruling of the Court below has, perhaps inadvertently, permitted a significant encroachment upon the effectiveness of the exclusionary rule as a deterrent against improper police tactics in compelling incriminating statements from criminal suspects. Interestingly enough, this is a rare situation in which petitioner is seeking to invoke the exclusionary rule in order to sustain his efforts to serve his country as an Army officer and not to avoid a criminal sentence. Nonetheless, the principle would also apply equally to one convicted of a crime based upon allegedly untruthful contents of a compelled statement.

In connection with the original disciplinary infraction for which petitioner was being investigated, he was required by order of the tactical officer in charge of the investigation to prepare two written statements, in the latter of which he was ordered to focus upon the factual issue of the length of time his car was on the Post (4a; see also White Appendix, pp. 42a, 44a, and 42a-16 to 42a-18). At the time, petitioner, as a cadet, was subject to the jurisdiction of the Uniform Code of Military Justice, 10 U.S.C. §802. His suspected conduct rendered him subject to possible prosecution under several substantive articles, including the making of a false official statement, 10 U.S.C. §907, and conduct unbecoming an officer, 10 U.S.C. §933. Moreover, pursuant to Regulation 16.04 of the Academy's regulations, the very Honor Code violation with which petitioner was subsequently charged could, at the option of the Superintendent of the Academy, have become the subject of a trial by court martial (5a).

Because he was compelled to make the potentially incriminating second report, which ultimately formed the basis of the charge against him (19a), petitioner contends that he has been denied his Fifth Amendment privilege against compulsory self-incrimination. *Albertson v. S.A.C.B.*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968); *Haynes v. United States*, 390 U.S. 85 (1968). Contrary to the holding of the Court below (19a), because he was subject to military order requiring him to prepare the report, this is not a case requiring an analysis of whether petitioner was sufficiently "in custody" for purposes of applying the standards of *Miranda v. Arizona*, 384 U.S. 436 (1966). It is the fact of that compulsion and not a claimed denial

of advice of the right to silence, about which petitioner complains. Petitioner satisfies all of the criteria for Fifth Amendment relief which are set forth in the cited mandatory reporting and registration cases. There was a real and substantial (as opposed to a trifling and imaginary) risk of self-incrimination. He was the focus of an investigation in which he was suspected of criminal activities, and the inquiry was designed to obtain evidence against him. For these reasons, petitioner should have been entitled to exclusion of the compulsorily obtained second report as evidence against him in the Honor Code proceedings.

The fact that the proceedings did not constitute a criminal trial is irrelevant since:

> ". . . the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault*, 387 U.S. 1, 49 (1967).

Similarly, *Romanelli v. Commissioner of Internal Revenue*, 466 F.2d 872 (7th Cir. 1972), held that a statement obtained in violation of the privilege against compulsory self-incrimination during a criminal investigation could not be used in a civil I.R.S. proceeding. See also *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

The Court below based its affirmance of the dismissal of petitioner's complaint on this issue upon an analogy to cases holding that the Fifth Amendment does not extend to grand jury

witnesses a blanket license to commit perjury. See *United States v. Winter*, 348 F.2d 204 (2d Cir. 1965), (20a). In so doing, the Court below opened the way for a dangerous encroachment of the limited doctrine of the *Winter* case into the domain of general police investigation where the privilege against compulsory self-incrimination has long been judicially safeguarded. To carry the Court's reasoning to its logical conclusion, police would be well advised to compel all criminal suspects to make sworn statements so that all those who lie to exculpate themselves can successfully be prosecuted for perjury! Obviously, such a conclusion was not contemplated in the grand jury perjury decisions relied upon by the Court below.

Petitioner contends, on the other hand, that the grand jury cases must be narrowly limited to their particular fact situations in order to reduce the risk of the privilege being consumed by its exception. Grand juries are constitutionally endowed bodies charged with the general investigation and evaluation of suspected criminal activity and the presentment of indictments where appropriate. The scope of grand jury investigations frequently transcends the suspected wrongdoing of a single person. Witnesses called before grand juries may refuse to testify and are routinely so advised when they are the focus or subject of the investigation. Indeed, even in *Winter*, the defendant freely elected to testify after he had been advised that he did not have to do so and that his testimony could be used against him.

It is quite another matter to rule in effect that untruthful statements compulsorily elicited by police authorities from one who is a suspect and the focus of a police investigation are not subject to the Fifth Amendment privilege solely by virtue of the fact that they are untrue. Under such an interpretation, the effect

of the privilege as a deterrent against police coercion and abuse in the interrogation process would be emasculated. So far as petitioner's research reveals, no previously decided case has gone that far.

Indeed, even the grand jury perjury exception has its limitations in situations involving "deliberate efforts to entrap witnesses into committing perjury." *United States v. Winter*, 348 F.2d at 2.0. See also *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957), in which it was determined that the admission in evidence in a perjury trial of a defendant's grand jury testimony was improper where the purpose in calling the defendant before the grand jury was to extract testimony with a view to a possible perjury indictment.

The undisputed facts in the instant case clearly distinguish it from the grand jury situation and render it far more akin to a police investigation. Cadet Andrews did not make his statement to an official quasi-judicial body conducting a general investigation into suspected criminal or delinquent conduct. He made it to a tactical officer who was performing police functions in conjunction with military police officers concerning disciplinary enforcement of the Academy's Cadet Code (26a-27a). Cadet Andrews was the sole focus of the investigation, just as a criminal accused is the focus of a post-arrest police investigation into all of the facts underlying the charges against him. Moreover, unlike the grand jury situation, Cadet Andrews was not given the opportunity to decline to testify. Instead, he was ordered to make the report (23a; see also White Appendix, p. 42a).

Under such circumstances, to extend an exception to the privilege against compulsory self-incrimination would frustrate the future exercise of the privilege in any police investigation where the possibility of exculpatory lying may arise. It was therefore error for the Court below to have relied upon the grand jury perjury exception in affirming the dismissal of petitioner's complaint.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that this Court grant the writ of certiorari prayed for in this petition.

Respectfully submitted,

s/ Harry E. Youtt

THAL & YOUTT
Attorneys for Petitioner

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 939, 940, 1187—September Term, 1973.

(Argued August 12, 1974 Decided January 16, 1975.)

Docket Nos. 73-1866, 74-1074 and 74-1782

ALBERT E. ANDREWS III,

Appellant,

v.

LT. GENERAL WILLIAM KNOWLTON, etc., et al.,

Appellees.

WILLIAM H. WHITE, et al.,

Appellants,

v.

LT. GENERAL WILLIAM KNOWLTON, etc., et al.,

Appellees.

Before:

OAKES, *Circuit Judge,*
FRANKEL and KELLEHER, *District Judges.**

Appellants, in these two consolidated appeals, brought separate actions in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief staying and setting aside their sep-

* Of the Southern District of New York and Central District of California, respectively, sitting by designation.

arations from the United States Military Academy at West Point, New York, for violation of the Cadet Honor Code. In two separate orders, the Honorable Whitman Knapp, rejecting the claimed denials of due process, dismissed each complaint. The Court of Appeals held that the procedures and the standard of proof utilized in the Board of Officers' hearings comport with due process; the Cadet Honor Committee is a mere charging body whose decisions had no effect other than to initiate *de novo* proceedings before a Board of Officers, and therefore the Due Process Clause does not require the utilization of any particular procedure by that committee; within the confines of due process, the sole penalty of separation of a cadet from the Academy is both reasonable and not arbitrary; the manner in which appellant Andrews' statement was obtained and later used against him did not violate his Fifth Amendment privilege against self-incrimination; and appellant Andrews was not erroneously foreclosed, by the dismissal of his complaint before he could have full discovery, from establishing that the Board of Officers' hearing was tainted by the Honor Committee's findings.

Affirmed.

PAUL J. CURRAN, New York, N.Y. (William Roche Bronner, Gerald A. Rosenberg, Asst. United States Attorneys, of counsel), *for Appellees.*

WOOD & FLOGE, Langhorne, Pa. (Joseph M. Grines, of counsel), *for Appellant White, et al.*

THAL & YOUTT, New York, N.Y. (Harry E. Youtt, of counsel), *for Appellant Andrews.*

KELLEHER, *District Judge:*

These are two consolidated appeals from separate orders of the United States District Court for the Southern District of New York dismissing each of the complaints after rejecting claimed denials of due process. *White* v. *Knowlton*, 361 F.Supp. 445 (S.D.N.Y. 1973); *Andrews* v. *Knowlton*, 367 F.Supp. 1263 (S.D.N.Y. 1973). We affirm.

In two separate actions arising out of different circumstances, appellants, who but for this appeal have been or will be separated from the United States Military Academy at West Point, New York, sought in the District Court for the Southern District of New York declaratory and injunctive relief against appellees, the Superintendent and Commandant of the Academy, and the Secretary of the Army, staying and setting aside their separation from the Academy for violation of the Cadet Honor Code.

Each appellant complains that the Cadet Honor Committee proceedings and subsequent hearings before the Board of Officers which resulted in separation from the Academy were so lacking in procedural safeguards as to constitute a deprivation of their constitutional rights. Each appellant here was first adjudged by the Cadet Honor Committee to be "guilty" of an Honor Code violation and was later found in proceedings before a Board of Officers to have violated the Honor Code. Each appellant was then separated from the Academy.

I

The facts in the Andrews case are simple and undisputed. While on a weekend pass, Cadet Andrews was observed on West Point grounds out of uniform in an unauthorized vehicle in which alcohol was found. The Military Police apprehended him and turned him over to the Tactical Officer on duty. In accordance with standard pro-

cedures, the cadet was required to submit a written explanation of the circumstances surrounding his reported rules infraction. Andrews' first report was incomplete, but ultimately he gave a statement which alleged, *inter alia*, that he had been present on Academy grounds with the vehicle for fifteen to twenty minutes. This statement contradicted a previously-submitted report of the military police which placed the vehicle on campus and under observation for over two hours. The case initially involved only the possibility of Andrews receiving demerits for his conduct, but because of the discrepancy between the times in the two reports, the matter was referred to the Cadet Honor Committee. In substance his case as brought before that committee involved an allegation of lying.

The facts in the *White* case are equally simple and uncontroverted. On April 5 and 6, 1973, the Department of Physics at the Academy administered four examinations. The same true-false and multiple choice questions were asked in two separate sections at different times. Because the Department was concerned about cheating, the order in which the questions were asked in the later examinations was scrambled. Each of the appellants took his examination at one of the later hours, and each paper showed what was felt to be an unreasonably high number of answers which, although inaccurate in the examination taken, correlated to approved solutions in the earlier examination. Cadet White and his co-appellants' cases were referred to the Cadet Honor Committee on the ground that they and others had obtained and utilized lists of approved answers. In substance the case against White and his co-appellants involved cheating.

Article 16 of the *Regulations for the United States Military Academy*, promulgated by the Secretary of the Army, governs the separation of cadets. Section 16.04

deals specifically with separations for Honor Code violations and provides:

> "a. A cadet who violates the Cadet Honor Code will be separated from the Academy. A cadet who is alleged to have violated the Honor Code may, at the discretion of the Superintendent, be allowed to resign, be tried by court-martial, or be brought before a board of senior officers convened by the Superintendent to investigate the matter and to make findings. In the event of trial, the action taken will be in accordance with the provisions of the Uniform Code of Military Justice, and applicable regulations.
>
> "b. If the cadet appears before a board of officers, the board will make findings with respect to all alleged violations of the Cadet Honor Code by the cadet concerned, and will submit a report of its proceedings and findings to the Superintendent. A copy of the report will be furnished to the respondent, who may submit a written statement to the Superintendent.
>
> "c. The Superintendent may seek the advice of any member of his staff or the Academic Board. He will review the report of proceedings; give full consideration to any statement submitted by the respondent; and approve or disapprove, in whole or in part, the findings of the board of officers. If he approves a finding of a violation of the Cadet Honor Code, he will submit his recommendation and all pertinent documents to Headquarters, Department of the Army, for final action. In such cases, and in cases of cadets who are allowed to resign, the Superintendent will also recommend either discharge from the service or transfer to an appropriate status in a Regular or Reserve component. If discharge is recommended, the type discharge will be specified."

Appendix A

While nothing in Section 16.04 above indicates that the Cadet Honor Committee plays any part in the process of separation for Honor Code violations, it appears that the Academy has developed the practice of referring all alleged violations to the Honor Committee. This procedure, as now outlined in a memo from the Commandant entitled "USCC Processing of Cadet Honor Cases" and distributed throughout the Academy command on November 29, 1972, specifically requires that apparent violations discovered by officers be first referred to the Cadet Honor Committee.

The Cadet Honor Committee is a student organization of the United States Corps of Cadets made up of 44 elected members. According to the Corps of Cadets' publication, *The Cadet Honor Code and Systems*, the Honor Committee is directly charged with the supervision and administration of the Honor Code and the Honor System, and "acting for the Corps, investigates and determines whether or not the alleged offender has actually transgressed the Honor Code."

The Cadet Honor Code in force at the United States Military Academy consists of a single maxim: "A cadet does not lie, cheat or steal or tolerate those who do."

When a case is referred to the Cadet Honor Committee, there is first a preliminary subcommittee investigation, and then twelve members are designated by the chairman to sit and hear the evidence. After all the witnesses have testified and the evidence has been presented, a secret vote is held to determine guilt or innocence. The vote must be unanimous, and if there is one "not guilty" vote, the proceedings end and the case is closed. During proceedings before the Honor Committee, an accused cadet is allowed to testify and to present witnesses on his own behalf. It should be noted that a cadet is not guaranteed any minimal time in which to prepare a case brought before

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the Honor Committee. In the cases now before us, the time between oral notice of a proceeding by the Honor Committee and the actual hearing ranged from three hours to several days. A cadet is not given formal written notice of the charges against him, and he has no right to know the identity of or cross-examine the witnesses against him. And, while it appears that there are provisions for "open hearings" before the Cadet Honor Committee, none was allowed in any of the cases now before us.

The cadet publication (printed by the Academy) referred to above further explains that "[i]f there be a finding of guilty, the Commandant reviews the case with his advisors and with the Chairman of the Honor Committee. He then interviews the accused after advising him of his rights, reminds him of the findings and recommendations of the Committee, and, in effect, extends him the option of resigning or having his case considered by a Board of Officers. The accused is urged to confer with his parents and, if he desires, to seek legal advice before he makes his decision."

In all of the cases encompassed by the present appeals, the Cadet Honor Committee found a violation of the Honor Code which was adopted by the Commandant, whereupon appellants were administratively segregated from the Corps and placed in "Boarders Ward." The purpose of Boarders Ward is to quarter those cadets who are undergoing separation actions. Permitted to attend classes, the cadet is sequestered in Boarders Ward until final disposition of his case.

In the cases now before us, after being given the option to resign or have a Board of Officers' hearing, each appellant chose to appear before a Board of Officers. Each Board of Officers was composed of five officers from the Academy staff summoned to hear one case. The proceedings were conducted pursuant to Army Regulation 15-6,

Appendix A

Procedures for Investigating Officers Conducting Investigations, which provides in part that after a full hearing, the Board will, based on a standard of "substantial evidence," decide a case by a majority vote. The Boards in the White case found each appellant guilty of violating the Honor Code by cheating. The Board in the Andrews case found Andrews guilty of violating the Honor Code by lying.

It now appears that after each appellant was adjudged guilty by a Board of Officers, each exhausted his administrative remedies, the proceedings having been reviewed successively by the West Point Staff Judge Advocate, the Superintendent of the Academy, and the Secretary of the Army, acting through one of his staff members.

II

Three common issues are raised by each appellant: (1) whether the proceedings before the Cadet Honor Committee comported with the procedural safeguards required by the Due Process Clause of the Fifth Amendment: (2) whether the procedures and the standard of proof utilized in the Board of Officers' hearings under Army Regulation 15-6 comported with the procedural due process guarantees of the Fifth Amendment; and (3) whether the sole penalty of expulsion of each appellant constitutes a violation of constitutional rights.

Andrews raises two additional issues unique to his case: (1) whether the requirement that he submit a written statement which was later used against him in the administrative hearings violated his Fifth Amendment privilege against compulsory self-incrimination; and (2) whether he was erroneously foreclosed by the dismissal of the complaint before discovery from factually establishing the impact of the finding of guilty by the Cadet Honor Committee upon the members of the Board of Officers.

Appendix A

In summary, the basic question before this Court is whether the procedures followed by the United States Military Academy at West Point, New York, in the separation of appellants for Honor Code violations were constitutionally sufficient.

III

The power of the District Court to review procedures used at our service academies in the separation or dismissal of cadets and midshipmen is clear. *Wasson* v. *Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Hagopian* v. *Knowlton*, 470 F.2d 201 (2d Cir. 1972). Since *Wasson, supra*, it has been understood that the service academies are subject to the Fifth Amendment and that cadets and midshipmen must be accorded due process before separation.

This Court noted in *Hagopian* v. *Knowlton, supra*, "[i]n approaching the question of what process is due before governmental action adversely affecting private interests may properly be taken, it must be recognized that due process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any given set of facts. On the contrary, it is a flexible concept which depends upon the balancing of various factors, including the nature of the private right or interest that is threatened, the extent to which the proceeding is adversarial in character, the severity and consequences of any action that might be taken, the burden that would be imposed by requiring use of all or part of the full panoply of trial-type procedures, and the existence of other overriding interests, such as the necessity for prompt action in the conduct of crucial military operations. The full context must therefore be considered in each case." 470 F.2d at 207.

In *Hagopian* this Court held that a full hearing was required before a cadet could be separated from the United

States Military Academy for excessive demerits. The Court noted that at such a hearing a "cadet must be allowed to appear and present evidence, including witnesses on his behalf." 470 F.2d at 211. In reaching this conclusion, the Court relied heavily on *Wasson* v. *Trowbridge*, *supra*, a similar case decided five years earlier.

In *Wasson* a third year student at the Merchant Marine Academy at Kings Point, New York, was dismissed after a hearing because of his accumulation of demerits in excess of the maximum allowance. Cadet Wasson challenged the denial of counsel at both the hearing awarding his demerits and the hearing recommending his dismissal from the Academy. He further charged in his complaint filed in the District Court that members of the panel awarding the demerits had participated in the investigation of facts leading up to the demerit hearing, that he had been denied a full opportunity to obtain and present favorable witnesses, and that notice of the hearing failed to give him adequate time to prepare a defense and failed to fully inform him of the evidence against him. The District Court's dismissal of the complaint based on the grounds that the charges contained therein did not amount to a denial of due process was reversed, and the case was remanded for a hearing to determine whether the procedures used in the separation of *Wasson* comported with due process of law. Taking note of the special context in which the challenged procedures operated, this Court set forth in *Wasson* in broad outline the required minimum standards of due process:

> "While the government must always have a legitimate concern with the subject matter before it may validly affect private interests, in particularly vital and sensitive areas of government concern such as national security and military affairs, the private interest must yield to a greater degree to the governmental. . . . Few decisions properly rest so exclusively within the discretion of the appropriate government officials than the selection, training, discipline and dismissal of the future officers of the military and Merchant Marine. Instilling and maintaining discipline and morale in these young men who will be required to bear weighty responsibility in the face of adversity —at times extreme—is a matter of substantial national importance scarcely within the competence of the judiciary. And it cannot be doubted that because of these factors historically the military has been permitted greater freedom to fashion its disciplinary procedures than the civilian authorities.
>
> "We conclude, therefore, that due process only requires for this dismissal of a Cadet from the Merchant Marine Academy that he be given a fair hearing at which he is apprised of the charges against him and permitted a defense. . . . For the guidance of the parties . . . the rudiments of a fair hearing in broad outline are plain. The Cadet must be apprised of the specific charges against him. He must be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence. We do not suggest, however, that the Cadet must be given this opportunity both when demerits are awarded and when dismissal is considered. The hearing may be procedurally informal and need not be adversarial.
>
> ". . . The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and

> educated, where his knowledge of the events . . . should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel." 382 F.2d at 812.

The holdings of *Wasson* and *Hagopian*, while they dealt with dismissal proceedings because of excessive demerits, are equally controlling here where appellants were separated from the Academy for violation of the Honor Code. From their teaching, it is clear that before a cadet can properly be dismissed or separated from his service academy, he must have a hearing, be apprised of the specific charges against him, and be given an adequate opportunity to present his defense both from the point of view of time and the use of witnesses and other evidence. A military proceeding conducted within these bounds of procedural due process would be proper and immune from constitutional infirmity. We and other tribunals have expanded at an accelerated pace the scope of judicial access for review of military determinations.[1] Nevertheless, we recognize the constitutional permissibility of the military to set and enforce uncommonly high standards of conduct and ethics.

IV

In the cases now before us, each appellant, after the adverse determination by the Cadet Honor Committee, was given a hearing before a Board of Officers where he had counsel, was allowed to call and cross-examine wit-

1 See, for example, an exhaustive compilation, treatment, and critique of the law as it applies to the service academies, Rose, *A Prayer for Relief, The Constitutional Infirmities of the Military Academies' Conduct, Honor and Ethics Systems* (1973), New York University School of Law.

nesses, and had the right to offer and object to the introduction of any evidence. Moreover, each appellant was given formal written notice of the charges against him and ample time with the aid of counsel to prepare his defense.

While appellants concede that the procedures followed by the Boards of Officers provide for the protection of their fundamental rights, they challenge the use of the evidentiary standard in Army Regulation 15-6, which provides for decisions of Boards of Officers by majority verdict based upon substantial evidence. Appellants contend that establishment of guilt beyond a reasonable doubt and by unanimous verdict is mandated by "the custom and written interpretation of the Honor Code." The custom and written interpretation herein alleged to supersede Army Regulation 15-6 are those of the Honor Committee cadets themselves.

Two responses are in order. First, this custom, by its own terms, relates only to the proceedings before the Cadet Honor Committee, and in no way binds the Boards of Officers. Second, insofar as a cadet "regulation" and one by the Secretary of the Army conflict, it is imperative to military discipline that the latter take complete precedence over the former. Appellants' contrary assertion is unsupported either by the published regulations or by a sensible construction of the scope of the powers of the Cadet Committee. Moreover, since the "custom and written interpretation" of the Honor Code have neither been published in the Federal Register nor distributed under Academy auspices, it does not create legally binding rights or obligations. Cf., Federal Register Act, 44 U.S.C. § 1505, *Siomkin* v. *Fairchild Camera & Instrument Corp.*, 174 F.2d 289 (2d Cir. 1949) (L. Hand, *J.*); Accordingly, we find that the proceedings before the Boards of Officers in no way impaired any constitutional right.

Appellants further contend that the hearings before the Cadet Honor Committee were "critical stages" in the separation process and, therefore, demand the same procedural safeguards as were present in each Board of Officers' hearing. They argue that as a result of the "guilty verdicts" by the Honor Committee, the separation process was so tainted and infected by the Honor Committees' determinations as to foreclose any question of guilt; each cadet suffered a great loss of liberty and privilege; each cadet's reputation within the corps was irreparably injured; and each cadet was pressured into resigning.

Appellees reply that no particular procedure is required by the Due Process Clause in Cadet Honor Committee hearings, for the requirements of *Wasson* and *Hagopian* have been satisfied because the hearings before the Boards of Officers were *de novo* and each appellant was there afforded his due process rights *before* he was separated; and the activities of the Cadet Honor Committee should not be considered governmental activity subject to due process limitations because the committee is nothing more than a student-created, student-run, preliminary investigating body whose determinations of an Honor Code violation may trigger but do not otherwise affect the administrative proceedings.

Initially, we address the question of whether the activities of the Cadet Honor Committee can for the purposes of the Due Process Clause be considered governmental activity. The relationship between the Cadet Honor Committee and the separation process at the Academy has been sufficiently formalized, and is sufficiently interdependent, so as to bring that committee's activities within the definition of governmental activity for the purposes of our review. While the Academy has long had the informal practice of referring all alleged violations to the Cadet Honor Committee, the relationship between that

committee and the separation process has to a degree been formalized. The November 29, 1972, memorandum from the Commandant, "USCC Processing of Cadet Honor Cases," provides in part that apparent violations of the Cadet Honor Code will be referred by the Deputy Commandant to the Chairman of the Cadet Honor Committee; if a cadet is found by the Honor Committee to have committed a violation and then elects to have proceedings before a Board of Officers, the chairman of the Honor Committee will be notified, and if the Board's findings do not support the allegations of the Cadet Honor Committee, its chairman will be advised by the Deputy Commandant to reconsider the case.

Regardless of whether the relationship be deemed formal or informal, the Honor Committee under its own procedures provides that a single "not guilty" vote by a member ends the matter, while a "guilty" finding confronts a cadet with the hard choice of either resigning or electing to go before a Board of Officers. An adverse finding there results not only in formal separation from the Academy but also in a damaging record that will follow the cadet through life. Accordingly, we conclude that the Cadet Honor Committee, acting not unlike a grand jury, is clearly part of the process whereby a cadet can ultimately be adjudged to have violated the Cadet Honor Code and be separated from the Academy. Therefore, the effect of the committee's procedures and determinations on the separation process is sufficiently intertwined with the formal governmental activity which may follow as to bring it properly under judicial review.

To support their claim of taint before the Board of Officers, appellants submitted statistics to show that between 1967 and 1972 there was only one successful appeal out of 150 "guilty" findings by the Cadet Honor Committee, and that only nine cadets chose Board of Officers' hearings over resignation. The statistics cover a time period before

Hagopian required due process in the separation of a cadet from the Academy. We permitted augmentation of the record to show that during the 1973-74 academic year at the Academy, Boards of Officers found no violation in five of that year's ten separation hearings. In further support of the contention of taint, appellants argue that the Cadet Honor Committee findings had a prejudicial impact upon those members of the Boards of Officers who had been cadets themselves. There are no facts in the record to support this contention.[2] On the basis of mere assertion that a West Point officer, sitting as a member of the Board of Officers, cannot fairly consider the evidence against a West Point cadet, the court below properly rejected the request to take deposition testimony of the officers. The judicial process, taken after administrative fact-finding, does not lightly accept a challenge to the fairness of the hearing officer. See: *Lopez* v. *Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2d Cir. 1974). Nor is judicial inquiry into the mental processes of the hearing officer favored. See: *National Nutritional Foods Ass'n* v. *Food & Drug Administration*, 491 F.2d 1141 (2d Cir. 1974).

While it is clear that the proceedings before the Cadet Honor Committee were wholly lacking in procedural safeguards, we are unpersuaded by the record now before us that the Cadet Honor Committee hearing was a critical stage in the separation of appellants from the Academy for Honor Code violations. There is no evidence in the record that the decisions by the Cadet Honor Committee in any way influenced the members of the Boards of Officers. On the contrary, the record convinces us that the proceedings before the Boards of Officers were *de novo* and

2 The record shows that in the hearing before the Board of Officers, the officers responded in the negative when asked by the lawyer who represented Andrews whether they would be influenced in any way by what had happened prior to the Board hearing.

were as free from infection and taint as is a trial in which jurors are aware that the defendant before them has been indicted by a grand jury. We find, therefore, that the Cadet Honor Committee is a charging body whose decisions had no effect other than to initiate *de novo* proceedings before a Board of Officers. We further hold that the requirements of *Wasson* and *Hagopian* were met because each appellant was separated from the Academy only after he was afforded a hearing with full procedural safeguards. Accordingly, we conclude that on the basis of the record now before us, the Due Process Clause does not require the utilization of any particular procedure by the Cadet Honor Committee.

We further find that the District Court correctly determined that segregation of cadets in Boarders Ward was a proper exercise of the discretionary authority of Academy officials. In this respect we are content to rely upon, in no way extending, the traditional doctrine that "[w]ith respect to decisions made by Army authorities, '[o]rderly government requires us to tread lightly on the military domain, with scrupulous regard for the power and authority of the military establishment to govern its own affairs within the broad confines of constitutional due process.'" *Hagopian*, *supra*, 470 F.2d at 208, quoting *Friedberg* v. *Resor*, 453 F.2d 935, 937 (2d Cir. 1971). And, as the District Court below noted, "[n]othing that happened to these plaintiffs in the Boarders' Ward . . . has the slightest bearing upon the question of whether these plaintiffs should be permitted to pursue their military careers, or has been shown to have any effect on the manner in which the several boards of officers conducted the cases before them." *White* v. *Knowlton*, *supra*, at 449.

The charges of ignominy and alleged pressure to resign which appellants contend flow from "guilty" determina-

tions by the Cadet Honor Committee are unsupported by the record. Ignominy suffered while at the Academy and injury to future officer careers after graduation of cadets who are found, after adverse Honor Committee findings, by a Board of Officers *not* to have violated the Cadet Honor Code, clearly raise important questions concerning the need for procedural safeguards at an initial hearing before the Cadet Honor Committee.[3] Because each appellant here was found by a Board of Officers to have violated the Honor Code and was separated from the Academy, the factual foundation upon which the above charges rest is not now before us. The appellants lack standing to assert such claim.

The regulations which establish the administrative procedure in Honor Code cases also provide that in all cases where Boards of Officers find violations, and their findings are upheld on review, separation from the Academy must ensue. Appellants challenge the sole penalty of expulsion as a violation of administrative due process. The District Court, summarily rejecting this challenge, stated:

> "The fact that a cadet will be separated from the Academy upon a finding that he has violated the Honor Code is known to all cadets even prior to the beginning of their careers there. The finding of a Code violation by hypothesis includes a finding of scienter on the part of the offender. While separation is admittedly a drastic and tragic consequence of a cadet's transgression, it is not an unconstitutionally arbitrary one, but rather a reasonable albeit severe method of preventing men who have suffered ethical lapses from becoming career officers. That a policy of admonitions or lesser penalties for single violations might be more compassionate—or even more effective

3 See *Rose*, *supra*, note 1, at 41-42, 192-43, 192.

> in achieving the intended result—is quite immaterial to the question of whether the harsher penalty violates due process." *White* v. *Knowlton*, *supra*, 361 F.Supp. at 449.

We agree with the court below and find that, while the penalty is severe, it is nevertheless reasonable and not arbitrary, and therefore does not violate due process.

Finally, we turn to appellant Andrews' challenge to the manner in which the written explanation of his alleged disciplinary infractions was obtained and later used against him in his separation from the Academy.

As part of the investigation of the alleged misconduct, Andrews was required to make two written explanations giving his version of the underlying circumstances. The second of those statements formed the basis of the Honor Code charges against him, since it set forth the alleged "lie" that the automobile was present on the Academy grounds for only fifteen or twenty minutes. Andrews contends that the warnings required by the rule enunciated in *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, L.Ed.2d 694 (1966), should have preceded the request that he submit his second written explanation, and that the failure to administer those warnings should have barred the use of his statement in the Honor Code violation hearings. The court below, without deciding if Andrews' situation was sufficiently custodial to have required *Miranda* warnings, adopted the government's contention that failure to give warnings cannot excuse subsequent false statements offered by a suspect in order to exculpate himself. The Court stated:

> "The government analogizes the situation at bar to that where a person suspected of a crime perjures himself before a grand jury in the absence of Miranda warnings, and then seeks to prevent prosecution for

perjury (by invoking the exclusionary rule) on the basis of absence of warnings. Such failure to warn does not require exclusion of the perjurious statement in the subsequent perjury prosecution. United States v. Winter (2d Cir. 1965, Judge Weinfeld), 348 F.2d 204; United States v. Ponti (E.D.Pa. 1966), 257 F. Supp. 925; United States v. Provinzano (E.D. Wis. 1971), 326 F.Supp. 1066. Were it otherwise, one would be well-advised to give false testimony, in the hope of avoiding prosecution for the offense originally charged with assurance that there could be no prosecution for the perjury by which such result had been achieved." *Andrews* v. *Knowlton, supra,* at 1265.

It is clear from *United States* v. *Winter, supra,* that the absence of warnings does not prevent prosecution for perjurious statements before a grand jury and by analogy, while the absence of warnings might prevent Andrews from being prosecuted for improperly being on campus or violating some other military regulation, his false statement is still subject to "prosecution" as a breach of the Honor Code. We agree with the District Court's finding that there was no constitutional infirmity in the admission into evidence at Andrews' hearing of his second report.

Because matters outside the pleadings were considered by the District Court below, the motions to dismiss were treated as motions for summary judgment, as is required by Rule 12(b) of the Federal Rules of Civil Procedure. *Carter* v. *Stanton,* 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972). We are satisfied that there are no genuine issues as to any material fact, and as a matter of law appellees are entitled to summary judgment. Accordingly, the orders (judgments) of the District Court are

Affirmed.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

73 Civ. 2474

ALBERT E. ANDREWS, III.

Plaintiff,

- against -

LIEUTENANT GENERAL WILLIAM KNOWLTON, Superintendent, United States Military Academy, et al.,

Defendants.

APPEARANCES:

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Attorney for Plaintiff
United States Attorney
Southern District of New York
United States District Court
Foley Square
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Appendix B

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HARRY E. YOUTT, Of Counsel

KNAPP, J.

This action was commenced on June 4, 1973 by a West Point Cadet who has been found by a Board of Oificers to have violated the Cadet Honor Code by making a false statement, and thus faces imminent separation from the Academy and the prospect of serving two years in the military as an enlisted man. The complaint seeks a declaratory judgment that the Academy proceedings which established his violation be rendered void, and injunctive relief to prevent his separation.

On June 14, 1973 the Court dismissed the complaint in *White v. Knowlton*, 361 F. Supp. 445, a suit brought by other West Point Cadets. The government thereafter moved to dismiss here, and plaintiff cross-moved for summary judgment or in the alternative for leave to proceed with discovery.

Insofar as the complaint in the instant case states claims that were rejected in *White*, they are dismissed for the reasons there stated. The questions remaining to be decided are:

1. whether the exclusionary rule should have been applied to suppress false statements made by plaintiff;

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2. whether the Uniform Code of Military Justice should have governed the proceedings rather than administrative procedure, and

3. whether discovery should be permitted in aid of plaintiff's attempt to establish that the Board of Officers may have been a) fatally biased against him, and b) tainted by the Cadet Honor Committee proceedings.

The Facts

On February 4, 1973, after having been observed for several hours sitting in a car on the Academy grounds, the plaintiff was apprehended by military police and charged with a disciplinary infraction described as "gross lack of judgment."

Academy regulations require that cadets charged with such infractions furnish to the authorities statements called "held reports" or "Explanations of Report." On February 7 and 8 plaintiff provided such accounts of the episode. In the latter account he claimed that he had been improperly on the premises for only a short while. That statement was in conflict with those made by the military police, who stated that they had observed plaintiff on the grounds for several hours. Accordingly plaintiff's reports were referred to the Cadet Honor Committee for investigation into the possible violation of the Honor Code maxim that "a cadet does not lie. . . ." In March the Committee charged plaintiff with a violation for having lied in the Report and subsequently "convicted" him of it. Thereafter plaintiff requested that a Board of Officers be convened to hold a hearing

on the charge. Upon a full hearing at which the statements were received in evidence, the Board issued its finding that plaintiff had lied about the length of time he had been on campus on the night in question.

1. Suppression

Briefly stated, plaintiff's contention is that Miranda warnings should have preceded the request that he submit his second Explanation of Report, and the failure to administer the warnings should have triggered the exclusionary rule as to that Report.

Generally speaking, Miranda warnings need only be given when a person, upon whom suspicion has focused for commission of a crime, is interrogated by law enforcement officials under such circumstances that he feels his freedom of movement is restricted.

The Court however need not decide whether the facts of this case describe a situation sufficiently custodial to have required Miranda warnings, because the Court finds persuasive the government's contention that in any event failure to give warnings cannot excuse subsequent false statements offered by a suspect in order to exculpate himself.

The government analogizes the situation at bar to that where a person suspected of a crime perjures himself before a grand jury in the absence of Miranda warnings, and then seeks to prevent prosecution for perjury (by invoking the exclusionary

rule) on the basis of absence of warnings. Such failure to warn does not require exclusion of the perjurious statement in the subsequent perjury prosecution. *United States v. Winter*, (2d Cir. 1965, Judge Weinfeld) 348 F.2d 204, *United States v. Ponti*, (E.D. Pa. 1966) 257 F. Supp. 925, *United States v. Provinzano*, (E.D. Wis. 1971) 326 F. Supp. 1066. Were it otherwise, one would be well-advised to give false testimony, in the hope of avoiding prosecution for the offense originally charged with assurance that there could be no prosecution for the perjury by which such result had been achieved.

When the policy considerations behind *Miranda v. Arizona*, (1966) 384 U.S. 436 are examined, it becomes evident that the purpose in requiring warnings is to deter the building of criminal cases by the expedient of coercing confessions from suspects or defendants. This policy would be in no way furthered by ruling that defendant may not be held accountable for lies told in deliberate effort to avoid prosecution.

In the instant case, the lie about the length of time plaintiff had been on the grounds contained in his Report — prepared in the absence of warnings — was the analytic equivalent of perjurious testimony offered to mitigate the seriousness of an offense previously committed. The lie was therefore admissible evidence in the proceeding brought to establish the lie — i.e., the Officer Board hearing.

Plaintiff does not quarrel with the analogy to perjurious testimony, but argues that such testimony would not be admissible in a perjury prosecution had it been deliberately

evoked from the defendant to satisfy suspicions that had arisen on the part of law enforcement officials. For this proposition he cites *Brown v. U.S.* (8th Cir. 1957) 245 F.2d 549, where a perjury conviction was reversed on the ground that the defendant had basically been entrapped into testifying before a grand jury that had no valid purpose in hearing him.

In the instant case, the record of plaintiff's Officer Board hearing discloses that Captain Stillwell, a Tactical Officer for plaintiff's company, asked plaintiff to submit the critical second report — referred to as a "continuation of the original explanation of report" — (R. 26) after he had read the original report and "noticed that there was an omission of something that had not been dealt with that I assumed would be dealt with. This particular omission was something I felt had to do with the defense that was . . . or the explanation that was being used by Mr. Andrews in mitigation, and therefore I felt that it should be addressed. And this is what prompted me to ask for additional information. . . ." id.

While not explicit in the record, the omission in plaintiff's first report referred to is apparently any mention of *how long* he had been on the grounds.

Captain Stillwell further testified that at the time he requested the supplemental report he neither considered plaintiff's omission a lie nor suspected plaintiff of having lied, because:

> "[M]y experience with explanations of reports is such that sometimes unless you specifically ask a question or tell them to deal with specifics, they sometimes do not — are not dealt with. . . ." R. 27.

And Captain Stillwell emphasized that the inadequacies of plaintiff's first report had prompted the Captain to plan to require the second report *prior to* his discovering from the military police that plaintiff had in fact been observed for several hours on the Academy grounds. Upon discovering that a possible conflict on the question of time might exist, Captain Stillwell assumed that any such conflict would naturally be resolved by the supplemental report. R. 30.

Finally, Captain Stillwell testified that:

> "there are many cases on the record where the individual has not fully explained the offense or he has not done it in a proper manner that, yes, he is normally requested to write one again or to add additional facts that bear on the case. Yes, that would be normal procedure." (R. 32.)

The foregoing testimony has been set forth in some detail in order to lay to rest plaintiff's argument that he was deliberately instructed to furnish the supplemental report in the hopes of eliciting proof of a lie for which he was already suspected. The record makes plain that when the second report was sought the authorities had not focused on a possible honor violation and did not seek the report for that reason.

Accordingly, the Court finds no constitutional infirmity in the admission into evidence at defendant's hearing of his second report, without deciding whether — had the report contained a confession rather than falsehoods — the totality of circumstances under which it was submitted by plaintiff would have triggered the requirement that Miranda warnings be first administered.

2. Jurisdiction

Plaintiff's second remaining contention is that the academic authorities at West Point lacked jurisdiction to hear and discipline him for lying, because the lie might conceivably have constituted some criminal offense for which plaintiff could have been court-martialed. For example plaintiff suggests that he might have been charged with the crime of signing a "false official statement" in violation of Article 107 of the Uniform Code of Military Justice, 10 U.S.C. §907.

It is plaintiff's position that by virtue of the decision to invoke against him the Cadet Honor Code rather than the Uniform Code of Military Justice, he was denied valuable rights and safeguards but not excused from serious sanctions.

It goes without saying that many administrative and civil proceedings result in harsh and fateful consequences, and yet are not required to be conducted as if they were criminal prosecutions. See e.g. *Goldberg v. Kelly*, (1970) 397 U.S. 254 [termination of public assistance payments to a recipient requires prior administrative hearing, but only one at which

"minimum procedural safeguards" need obtain (at 271)]; *Morrissey v. Brewer* (1972) 408 U.S. 471 [revocation of parole must be preceded by two hearings that meet the requirements of due process, but neither is part of the criminal prosecution nor need be conducted as such]; *Gagnon v. Scarpelli* (1973) 411 U.S. 778 [revocation of probation similarly requires prior hearing, but no need per se for counsel to be appointed].

Indeed, it has recently been held that even in disciplinary proceedings for minor offenses committed by servicemen in the military — known as summary courts-martial — appointment of counsel is not required to satisfy due process. *Daigle v. Warner* (9th Cir. 1973) 42 L.W. 2269-70. Compare *In re Gault* (1967) 387 U.S. 1 and *In re Winship* (1970) 397 U.S. 358. In these latter cases it was held that juvenile proceedings were comparable in seriousness to a felony prosecution [in *Winship*, quoting from *Gault*, Mr. Justice Brennan observed (397 U.S. at 365-6):

> ". . . civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for '[a] proceeding where the issue is whether the child will be found to be delinquent and subjected to the loss of his liberty for years *is comparable in seriousness to a felony prosecution*'." (emphasis added)].

In contrast to juvenile proceedings that may be benevolent in purpose but in effect are the functional equivalent of criminal prosecutions, the Cadet proceedings here attacked do not have

consequences as disastrous as do its possible criminal counterpart. Had a criminal proceeding for violation of Article 107 been invoked, the possible penalty would have been confinement at hard labor not to exceed one year in addition to dishonorable discharge, and forfeiture of all pay and allowances. 10 U.S.C. §856. The penalty for violation of the Cadet Honor Code, on the other hand, is, as already stated, separation from the Academy, which is followed by service in the military. The military service requirement is not a punishment. It is required by the Congress in order to satisfy the obligation to serve which was undertaken by the ex-cadet when he entered the military academy. See 10 U.S.C. §4348.

3. Issues of fact

Plaintiff's final contention is that issues of fact exist as to a) the possible prejudicial impact of the Cadet Honor Committee findings upon those members of the Board of Officers who had been Cadets themselves, and b) the possible use made by the Board of Officers of the allegedly tainted fruits of the Cadet Honor Committee proceeding. Plaintiff contends that *White v. Knowlton*, should not preclude trial of those issues because there plaintiffs were willing to proceed summarily on affidavits.

The Court recognizes that *White v. Knowlton* is not binding here, but can see no material facts placed in issue by this plaintiff. As to (a), the officers were questioned carefully by the lawyer who represented plaintiff at the Board hearing about their ability to fairly consider the evidence. There is no reason to believe they would respond differently at deposition or trial. As

to (b), plaintiff alleges no facts to indicate that "tainted" information was used by the Board of Officers, but merely speculates that it might have been. Given that plaintiff's false statements were properly considered by the officers (as to which see above), the evidence of his guilt was clearly substantial and there is no reason to believe that any prior proceedings had any bearing on the almost inescapable finding by the officers that plaintiff had violated the Honor Code.

Defendants' motion for summary judgment is accordingly granted and the complaint dismissed.

IT IS SO ORDERED.

Dated: New York, New York

December 7, 1973.

WHITMAN KNAPP,
U.S.D.J.

Supreme Court, U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

No. 74-1217

In the Supreme Court of the United States

OCTOBER TERM, 1974

ALBERT E. ANDREWS, III, PETITIONER

v.

LIEUTENANT GENERAL WILLIAM KNOWLTON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner filed suit in the United States District Court for the Southern District of New York seeking both a declaratory judgment as to the validity of the administrative determination that he had violated the Cadet Honor Code of the United States Military Academy and an injunction to prevent his separation from the Academy for that reason. The district court granted summary judgment for the defendants dismissing the complaint (Pet. App. 21a-31a) and the court of appeals affirmed (Pet. App. 1a-20a).[1]

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[1]In the court of appeals petitioner's case was consolidated with that of another dismissed West Point cadet, who has not sought review in this Court.

1. On February 4, 1973, Military Police saw petitioner, a West Point cadet then on leave, on campus out of uniform, in an unauthorized vehicle containing alcohol (Pet. App. 3a). The authorities charged petitioner with "gross lack of judgment" (*id.* at 23a). As required by standard Academy procedures, on February 7, 1973, petitioner submitted a written explanation of the incident, in which he admitted that he had been present in the vehicle on campus. Because this report was incomplete, in that it did not state when petitioner was on campus in the vehicle, the authorities ordered him to submit a second statement specifying the relevant time period. On February 8, 1973, petitioner gave a second statement asserting that it had been for about fifteen to twenty minutes. This contradicted the previously submitted report of the Military Police, who saw the vehicle on campus for over two hours (*id.* at 4a). Recognizing a potential violation of the Cadet Honor Code, which states that "[a] cadet does not lie, cheat or steal or tolerate those who do," the Military Police officer immediately ceased his inquiry and referred the matter of petitioner's apparent lying to the Cadet Honor Committee (*id.* at 6a).[2]

In cases of suspected Honor Code violations, a committee of cadets known as the Cadet Honor Committee convenes, holds a hearing, and considers whether to allege an Honor Code violation. If it issues such an allegation, the cadet charged may, in the discretion of the Superintendent, have the option of resigning or being brought before an administrative Board of Senior Officers (*id.* at 5a).

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[2]A cadet who exhibits a "gross lack of judgment" is subject to demerit; a cadet who violates the Honor Code, however, is subject to dismissal from the Academy (Pet. App. 4a, 5a).

A Board of Officers considers the alleged Honor Code violation *de novo*; the adverse Cadet Honor Committee determination is entitled to no weight. A cadet brought before the Board of Officers has the right to a statement of the charges against him, the right to counsel, the right to impartial fact finders, the right to call and cross-examine witnesses, the right to offer relevant evidence and the right to object to the introduction of evidence offered against him. If the Board finds a violation of the Honor Code, the cadet has a right to file a "statement," constituting an appellate brief, with the Superintendent of the Academy, who, along with the West Point Staff Judge Advocate, considers the issues raised and approves or disapproves the action taken. A delegate of the Secretary of the Army conducts a second, independent view (*id.* at 5a-8a, 12a-13a).

In March 1973, the Cadet Honor Committee concluded that petitioner had violated the Honor Code by lying. In April 1973, the Board of Officers convened and gave petitioner a full hearing at which he was represented by counsel. The Board found that petitioner had committed the alleged Honor Code violation and its findings were affirmed at each of the subsequent levels of administrative review (*id.* at 7a-8a).

2. Petitioner maintains that his separation from the Academy would deny him liberty or property without due process because of procedural deficiencies in the proceedings before the Cadet Honor Committee (Pet. 12-19). The adverse determination of that Committee, however, did not itself result in petitioner's separation. Rather, the separation was based on the determination of the Board of Officers, whose proceedings (see *supra*) provided due process, as the court of appeals held (Pet. App. 12a-13a, 17a) and petitioner concedes (Pet. 17). The court of appeals properly found the Cadet Honor Committee to be "not unlike a grand jury" (Pet. App. 15a), *i.e.*, "a charging

body whose decision had no effect other than to initiate *de novo* proceedings before a Board of Officers" (*id.* at 17a).[3] Accordingly, petitioner's separation was no more subject to challenge on due process grounds because of the absence of certain procedural rights at the Committee stage than is a criminal conviction tainted by the comparable absence of rights before a grand jury.[4]

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[3]Petitioner complains that one consequence of the Committee's adverse determination was that, although still permitted to attend class, he was required to live in a special "Boarders Ward" for the one month period between the determinations of the Committee and the Board of Officers. Even if this marginal restriction of privileges implicated the due process clause of the Fifth Amendment (compare *Wolff* v. *McDonnell*, 418 U.S. 539, 558-559, 571-572, n. 19), petitioner's contention is not properly presented in this case. Having been separated from the Academy on the basis of the Board of Officers' determination that he violated the Cadet Honor Code, petitioner is no longer subject to that restriction and, since this is not a class action, his claim in that regard is moot. Compare *Gerstein* v. *Pugh*, No. 73-477, decided February 18, 1975, slip op. 6-7, n. 11. For the same reasons, no live controversy exists concerning petitioner's claim that the Cadet Honor Committee's adverse ruling "could have resulted" in social ostracism and ignominy in the eyes of his fellow cadets (Pet. 7).

[4]That some of his fellow cadets or other military officers might have attached adverse consequences to the Committee's adverse determination even if petitioner had been vindicated by the Board of Officers does not mean that the Committee's proceedings were constitutionally deficient. It is equally likely that civilians often suffer similar consequences because they have been indicted by a grand jury even if they have since been acquitted at trial. In any event, as the court of appeals properly held (Pet. App. 18a), having been found guilty by the Board of Officers, petitioner has no standing to complain about what might have happened as a result of the Committee's adverse decision if he had been vindicated by the Board. Cf., *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 166-171; *McGowan* v. *Maryland*, 366 U.S. 420, 429-431.

3. Petitioner's contention that the district court erroneously barred discovery to establish whether the finding by the Cadet Honor Committee had an adverse impact on the Board of Officers (Pet. 23-26) is also without merit. When asked by petitioner's counsel at the hearing before the Board, the Officers said they would not be influenced in any way by what had previously happened in the case (Pet. App. 16a, n. 2). As the court of appeals correctly noted (Pet. App. 16a):

> On the basis of a mere assertion that a West Point officer, sitting as a member of the Board of Officers, cannot fairly consider the evidence against a West Point cadet, the court below properly rejected the request to take deposition testimony of the officers. The judicial process, taken after administrative fact-finding, does not lightly accept a challenge to the fairness of the hearing officer. * * * Nor is judicial inquiry into the mental processes of the hearing officer favored.

4. Finally, petitioner alleges that his second report could not be used as the basis for a charge that he lied because the Academy authorities did not give him *Miranda* warnings (Pet. 26-31). This contention is without merit. The court below correctly held that "failure to give warnings cannot excuse subsequent false statements offered by a suspect in order to exculpate himself" (Pet. App. 19a). As the district court correctly noted (Pet. App. 25a):

> Were [the rule to be] * * * otherwise, one would be well-advised to give false testimony, in hope of avoiding prosecution for the offense originally charged with assurance that there could be no prosecution for the perjury by which such result had been achieved.

> When the policy considerations behind *Miranda* * * * are examined, it becomes evident that the purpose in requiring warnings is to deter the building of criminal cases by the expedient of coercing confessions from suspects or defendants. This policy would be in no way furthered by ruling that defendant may not be held accountable for lies told in deliberate effort to avoid prosecution.

See also *United States* v. *Knox*, 396 U.S. 77; *Bryson* v. *United States*, 396 U.S. 64, 72.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1975.

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[5]Petitioner does not claim, and the record does not suggest, that the request that he submit a second report covering the duration of his already admitted presence in the unauthorized car was intended primarily to entice him to lie, leaving no alternative to that but confession to a violation. Accordingly, even if the differences in context between criminal proceedings and Honor Code proceedings are ignored, there is no reason to hold this case for the disposition of *United States* v. *Mandujano*, No. 74-754, certiorari granted March 24, 1975, which presents the question whether a "putative defendant" may be prosecuted for perjury committed when testifying before a grand jury without having been given complete *Miranda* warnings.